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No. 73-1808

In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES BURNETT MCKAY LAING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Petitioner, a citizen of New Zealand, entered the United States from Canada on a temporary visitor's visa on May 31, 1972. On June 24, 1972, he and two companions were refused entry into Canada by Canadian officials. As a result, they returned to the United States where they were stopped at the border by United States Customs officials in Derby, Vermont. Upon a search of the vehicle in which petitioner and his companions were travelling, the customs officers found concealed in the engine compartment a suitcase containing more than $300,000 in United States currency (Pet. App. B 20).

After notification by the customs officials, the District Director of Internal Revenue, in Burlington, Vermont, determined that petitioner and those accompanying him were in the process of putting their assets beyond the

reach of the government by removing them from the United States, which would prejudice or render ineffectual the collection of income tax. Pursuant to the authority under Section 6851(a) of the Internal Revenue Code of 1954, the District Director declared the taxable years of the three individuals immediately terminated. Assessments were made against each individual of $310,000[1] for the period January 1, 1972, through June 24, 1972. Following their refusal to pay the tax, the money found hidden in the engine compartment of the automobile was levied upon and seized by the Internal Revenue Service. A portion of this sum was applied to the tax assessed against petitioner (Pet. App. B 20-21).

Petitioner thereupon commenced this suit in the United States District Court for the District of Vermont to enjoin the continued possession of the seized funds by the Internal Revenue Service. He urged that the bar of the Anti-Injunction Act (26 U.S.C. 7421(a)) against suits "for the purpose of restraining the assessment and collection of any tax * * *" was not applicable because the Internal Revenue Service had not issued a notice of deficiency to him prior to the seizure of the funds. Specifically, petitioner argued that there is an exception under Section 6213(a) of the Code to the bar of the Anti-Injunction Act where the Internal Revenue Service does not issue a notice of deficiency prior to assessment and collection.

Following the decision in *Irving* v. *Gray*, 479 F. 2d 20 (C.A. 2), the district court held that a notice of deficiency is not required when, as here, the Internal

[1]The assessment against petitioner was subsequently abated to $195,985.55 (Pet. App. B 21).

Revenue Service terminates a taxpayer's taxable year pursuant to Section 6851. It accordingly dismissed petitioner's suit for injunctive relief as prohibited by the Anti-Injunction Act[2] (Pet. App. B 19-27).[3] The court of appeals affirmed *per curiam* (Pet. App. A 15-18).

2. Although we believe that the decision below is correct, there is a direct conflict among the circuits on the question of the availability of injunctive relief against the collection of tax pursuant to the termination of a taxpayer's taxable year under Section 6851 without the issuance of a notice of deficiency. The Second Circuit in *Irving* v. *Gray*, *supra*, and in this case has held that in such circumstances actions to enjoin the seizure of property pursuant to the termination of a taxpayer's taxable year are barred by the Anti-Injunction Act, The Seventh Circuit in *Williamson* v. *United States*, 31 A.F.T.R. 2d 73-800 (unreported order of April 8, 1971), has also held in the context of a refund suit for taxes collected pursuant to a Section 6851 termination of a taxable year, that such a termination does not require

[2]The district court also rested its decision upon the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201) (Pet. App. B22).

[3]The district court further determined that petitioner did not meet the narrow two-fold exception to the Anti-Injunction Act established by this Court in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, and most recently reaffirmed in *Bob Jones University* v. *Simon*, No. 72-1470, decided May 15, 1974; and *Commissioner* v. *"Americans United", Inc.*, No. 72-1371, decided May 15, 1974. It concluded that petitioner did not demonstrate that: (1) under no circumstances would the government ultimately prevail on the merits of its tax claim; and (2) that he was without an adequate remedy at law. In fact, petitioner has commenced a refund suit which is currently pending in the district court (D. Vt.-Civ. No. 73-137). The parties have recently filed a stipulation in that case that the trial be delayed until the disposition by this Court of this petition for certiorari or a decision on the merits.

the issuance of a notice of deficiency. To the contrary, however, the Sixth Circuit has held in *Rambo* v. *United States*, 492 F. 2d 1060, and in *Hall* v. *United States*, 33 A.F.T.R. 2d 74-903 (decided March 12, 1974), that the bar of the Anti-Injunction Act is inapplicable if, as here, the Internal Revenue Service terminates a taxpayer's taxable year under Section 6851 without the issuance of a notice of deficiency.

Moreover, the issue in this case is of particular importance to the administration of the federal tax laws. At present there are more than 70 cases pending in the federal courts involving this question[4] and it is expected that the number of cases will continue to increase.[5]

Accordingly, we do not oppose the granting of the petition for a writ of certiorari.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[4]The issue presented here is also pending in the Third, Fourth, Fifth, and Ninth Circuits. Noting the divergent decisions in this area, the Tax Court has suggested that review by this Court is appropriate. *Jones* v. *Commissioner*, 62 T.C. No. 1, decided April 1, 1974, slip op. 6.

[5]We have been advised by the Internal Revenue Service that for the fiscal year 1972, it terminated the taxable years of more than 600 taxpayers and correspondingly assessed taxes in excess of $30 million. For the fiscal year of 1973, more than 1800 taxable years were terminated with assessments in excess of $60 million.